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Commercial Law – 1960 Oregon Survey

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COMMERCIAL LAW—1960 OREGON SURVEY*

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REMEDIES OF A CONDITIONAL VENDEE FOR WRONGFUL REPOSSESSION

THE occasion for vendors to repossess cars sold on conditional-sales contracts arises so frequently today that independent businesses have been established solely to perform this service. Occasionally, such repossession is wrongful, and, when this is true, the vendee may seek redress on any of several theories. In *Hall v. Work*[1] the vendee sought damages for conversion. The case is significant as an illustration of one of the risks inherent in the pursuit of this theory. The supreme court held that the measure of damages for conversion of the vendee's car was the market value of the car at the time of the conversion less the amount the vendee then owed on the contract. Thus, whenever, as was found to be true in this case, the market value of a car is less than the amount owed on the contract, the vendee recovers nothing. Moreover, the vendee may thereafter be sans the car repossessed, sans the car he originally traded in (valued in this case at $431.42), and sans the amount paid in monthly payments (here apparently $400). Although the vendee has the use of the car (in this case for approximately five months) prior to its repossession, this fact is not likely to mollify his feeling that he has won a hollow victory.

Part of the rationale of the majority opinion appears to be that there were other satisfactory remedies available to the vendee. The court stated that the vendee could have replevied the car and then recovered damages for the wrongful repossession. The court also suggested that the vendee might have rescinded and recovered the amount of the trade-in-allowance and the amount paid on the contract.

In *Bradford v. Western Oldsmobile, Inc.*,[2] the plaintiff, Bradford, had purchased a car on a conditional-sale contract from the defendant dealer, Western Oldsmobile, Inc. This contract required the purchaser to pay a $300 downpayment in addition to a trade-in-allowance of $911.

* The period surveyed is from October 1, 1959 to October 1, 1960.
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1 354 P.2d 837 (Or. 1960).
2 353 P.2d 232 (Or. 1960).

When this downpayment was not made, the dealer repossessed the car and the buyer brought this action for conversion of the car, claiming $911 general damages and $4,000 punitive damages. The buyer contended that the dealer was "estopped" from asserting that failure to pay the $300 constituted default inasmuch as the dealer had promised to procure for him a loan of $300 to enable him to make the downpayment but had failed to do so. The dealer argued that the buyer could not have justifiably relied on this promise because he had falsified his statement of financial condition with knowledge that the dealer would use this statement when attempting to procure the loan. The supreme court agreed with the dealer's view of the case and held that the trial court had erred in not directing a verdict for the dealer.

Although the result in the *Bradford* case appears sound, the court's use of estoppel concepts to decide whether the buyer was in default is objectionable. The traditional doctrine of equitable estoppel was not relevant because the dealer's promise to procure the $300 loan was not a representation of past or existing fact.[3] The doctrine of promissory estoppel was also irrelevant inasmuch as this doctrine functions properly only as a substitute for the requirement of consideration.[4] The only relevant doctrine potentially available to support the buyer's position was the doctrine that a conditional obligation does not arise unless the condition is met. Thus, the buyer might have assailed the dealer's defense that the buyer had defaulted on his obligation to pay $300 by arguing that this obligation did not arise unless the dealer performed his oral promise to obtain a $300 loan for the buyer, and that the dealer had not performed this promise at the time of the alleged conversion.

Extension of estoppel concepts beyond the areas in which equitable estoppel and promissory estoppel are properly operative is likely to obscure the true issues and should accordingly be discouraged. For example, if, instead of relying on estoppel concepts, the court had analyzed the *Bradford* case in terms of the afore-stated "conditional obligation" theory, one weakness of the buyer's position would have been immediately apparent. This is that evidence of the dealer's oral promise to procure the $300 loan would probably have been inadmissible under the parol-evidence rule. In the *Bradford* case, the buyer's lawyer ingeniously avoided operation of this rule by framing the issue in estoppel terms. A second fatal weakness of the unsatisfied-condition theory in the present case is that the dealer's failure to procure the loan would probably have been excused because of the buyer's misrepresentations. Thus, under this nonestoppel theory also, the case would probably have been decided for the dealer. Suppose, however, that a subsequent case arises in which the buyer has revealed his true financial condition, and the

[3] POMEROY, EQUITY JURISPRUDENCE 805 (5th ed. 1914).
[4] 1 WILLISTON, CONTRACTS 139 (rev. ed. 1936).

dealer has allegedly failed to perform an oral promise to procure a loan to enable the buyer to make his downpayment. Should the buyer be entitled to subvert the policy of the parol-evidence rule by framing the issue in terms of whether the dealer should be "estopped" from asserting that the buyer is in default because of failure to make the downpayment?

Warranty Liability

In *Sol-O-Lite Laminating Corp. v. Allen,*[5] the seller, Sol-O-Lite, sold rolls of transparent plastic materials to the buyer, Allen, for use as a substitute for storm windows. Upon the buyer's refusal to pay in full therefor, the seller brought this action to recover $7,782.20, allegedly the amount owed. The buyer counterclaimed for breach of warranty, alleging that the plastic materials were not sufficiently transparent and were otherwise defective. The jury returned a verdict for the seller, but, since this was only for the amount of $1,000, it appealed.

The supreme court held that the trial judge erroneously instructed the jury on the measure of damages for breach of warranty, and, more important, that the buyer's counterclaim failed to state a cause of action for breach of warranty. The buyer had argued that he had attempted to allege breach of an implied warranty of merchantability, an attempt that the court considered abortive because the buyer failed to allege satisfactorily that the purchase was "by description," as required by Or. Rev. Stat. sec. 75.150(2) (1959). The court also noted that, although the buyer alleged that the goods were purchased for a special purpose known to the seller, the counterclaim did not state a cause of action for breach of implied warranty of fitness or for breach of an express warranty because the buyer had failed to allege the necessary element of reliance on the seller's skill and judgment. Although the case is not a landmark in the law of warranty liability, it underscores the importance of careful pleading.

Risk of Loss

Raylo Lumber Co. v. Oregon Pac. Lumber Co.[6] illustrates the operation of one of several provisions of the Uniform Sales Act that, unless the parties express a contrary intention, govern transfer of title and therefore risk of loss in the ordinary sale transaction.

The seller, Raylo Lumber Co., owned a lumber mill at Fortune, California. The buyer, an Oregon corporation, ordered three carloads of lumber from the seller, requested that the lumber be shipped to it at Council Bluffs, Iowa, and agreed to pay at a specified rate "F.O.B. DE-

[5] 353 P.2d 843 (Or. 1960).
[6] 352 P.2d 749 (Or. 1960).

LIVERED." After the lumber had been loaded into a boxcar, but prior to its removal from a siding near the seller's mill, fire damaged the lumber. Thereafter, the buyer refused to pay the full amount of the purchase price, and the seller brought this action to recover it.

The trial court awarded the seller judgment for the unpaid portion of the purchase price and the buyer appealed. The supreme court reversed the judgment, and held that the risk of fire loss was on the seller because the seller had retained title. The court reasoned that, since there was no understanding between the parties respecting time for passage of title, Rule 5 of section 19 of the Uniform Sales Act applied, and the seller was accordingly deemed to have retained title. Rule 5 provides that,

> if the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.[7]

Although the pertinent provisions of the sales section of the proposed UNIFORM COMMERCIAL CODE do not allocate risk of loss on the basis of title, the instant case would be decided similarly under the code.[8]

CONVERSION OF COMMERCIAL PAPER

In *Manufacturer's Trust Co. v. Nelson,*[9] the defendant, Nelson, ordered from Continental Radiant Glass Heating Corp. 400 radiant-heating panels which Continental thereafter shipped in four lots of 100 each to Nelson. As was its custom in dealing with Nelson, Continental drew a sight draft on Nelson for each lot, attached an order bill of lading thereto, and delivered these documents to the plaintiff with instructions to transfer the bills of lading to Nelson when Nelson paid the drafts. The plaintiff intended to send all four sets of these documents to its agent, the United States National Bank of Portland, but by mistake mailed one set to Nelson's place of business. Nelson used the bill of lading to obtain one lot of panels and thereafter refused to pay for the lot, claiming that Continental was indebted to him in an amount in excess of the price of the lot.

Subsequently, the plaintiff complied with Continental's demand that the plaintiff credit Continental's account in the amount of the draft mistakenly sent to Nelson. The plaintiff then brought this action

[7] OR. REV. STAT. sec. 75.190, Rule 5 (1959).

[8] UNIFORM COMMERCIAL CODE sec. 2-509: "Perhaps the principal change in the rules carried forward from the Sales Act is the de-emphasizing of the concept of title." Malcolm, *The Uniform Commercial Code,* 39 OR. L. REV. 318, 325 (1960). For a criticism of this change, see Williston, *The Law of Sales in the Proposed Uniform Commercial Code,* 63 HARV. L. REV. 561, 566 (1950).

[9] 350 P.2d 169 (Or. 1960).

against Nelson for conversion of the bill of lading and prevailed in the trial court. On appeal, the supreme court affirmed, and, in a very brief opinion, held that an agent entitled only to possession of commercial paper may maintain an action for conversion against one who wrongfully interferes therewith, and that the interfering party cannot excuse his interference by claiming that the agent's principal is indebted to him.